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SHOW PROCEEDINGS AND ORDERS DATE: [10/31/89]

CASE NBR: [89105072] CSH STATUS: [ ]
SHORT TITLE: [Wilkerson, Richard James]
VERSUS [Texas] DATE DOCKETED: [07/1189]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jul 11 1989		Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
Jul 11 1989		Application (A89-24) for a stay of execution of sentence of death pending disposition of the petition for writ of certiorari, submitted to Justice White.
Jul 13 1989		Application (A89-24) denied by Justice White.
Jul 28 1989		Brief of respondent Texas in opposition filed.
Aug 3 1989		DISTRIBUTED. September 25, 1989
Aug 17 1989		Record requested.
Sep 22 1989		Record filed.
Sep 28 1989		REDISTRIBUTED. October 13, 1989
Oct 16 1989		The petition for a writ of certiorari is denied. Dissenting opinion by Justice Marshall with whom Justice Brennan joins. (Detached opinion.)

(2)

89-5072

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. _____

RICHARD JAMES WILKERSON, Petitioner

VS.

THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

SHULTS, HETHERINGTON & TARICS

BY: Robert A Shults
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Counsel for Petitioner

31 pp

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NO. 383,749

RICHARD JAMES WILKERSON, Petitioner

VS.

THE STATE OF TEXAS, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

The Petitioner, Richard James Wilkerson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered on May 15, 1989, in which the Petitioner's application for writ of habeas corpus was denied by the Court of Criminal Appeals. It is realized by the Petitioner that applications for a writ of certiorari directed to state appellate courts in regard to their denials of applications for writs of habeas corpus are not favored and are routinely denied. However, it is asserted that the facts are clearly developed in this case so as to present this court with a clear case of the use by the prosecution of racial factors in the exercise of its peremtory challenges to the jury and that close scrutiny should be given to this application by reason of this fact.

QUESTIONS PRESENTED FOR REVIEW

1. The trial court, after holding a hearing on the Petitioner's application for a writ of habeas corpus, made findings of facts and conclusions of law upholding the prosecution's use of its peremtory challenges to strike all of the black prospective jurors during jury selection. However, one

of the prosecutors testifying in regard to certain of the jury selection processes, candidly admitted that the common race of at least two the prospective jurors and the Petitioner was a factor in his decision to exercise peremtory challenge against those jurors. The issue is whether the failure of the trial court to consider this admission by the prosecutor was an abuse of discretion and whether the consideration of race as a factor in the exercise of peremtory challenges by the State violates the provisions of Section 1 of the Fourteenth Amendment of the United States Constitution which guarantees the equal protection of the law and whether such activity also violates the provisions of the Sixth Amendment wherein trial by an impartial jury is likewise guaranteed.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REFERENCE TO REPORTS BELOW

1. Petitioner was tried in the District Court of Harris County, Texas, 179th Judicial District for the offense of capital murder. Trial proceedings are not published in Texas, but the trial record is available from the Texas Court of Criminal Appeals.
2. On May 14, 1986, judgment was rendered affirming this conviction by the Texas Court of Criminal Appeals sitting en banc. This opinion is published at 726 S.W.2d 542.
3. On or about August 12, 1987, the Petitioner filed an application for writ of habeas corpus and an affidavit stating that he was indigent. In the application, the Petitioner advanced several grounds for the reversal of his conviction including the contention that the State utilized its peremtory challenges during jury selection to eliminate all black potential jurors from the petit jury in violation of the "equal protection" clause of the Fourteenth Amendment as well as the "impartial jury" clause of the Sixth Amendment and pursuant to the opinions in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d, 759 (1965) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 9 L.Ed. 2d 69 (1986).
4. The trial court entered findings of fact and conclusions of law stating, relative to the jury selection issues, that the Petitioner did not object to the use by the prosecution of its peremtory challenges to strike blacks from the jury panel until the motion for new trial hearing and had, therefore, waived his right to a Batson hearing in regard to the application for writ of habeas corpus. The Texas Court of Criminal Appeals remanded the application to the trial court for a hearing on the equal protection issues pursuant to the holding of Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

5. After an evidentiary hearing, the trial court signed the proposed findings of fact and conclusions of law submitted by the State and transmitted the recommendations contained therein to the Texas Court of Criminal Appeals. A true and correct copy of the findings of fact and conclusions of law as executed by the trial court is attached hereto in the Appendix. The trial court specifically refused to adopt the proposed findings of fact and conclusions of law as submitted by the Petitioner, which document is likewise attached hereto in the Appendix.
6. On May 15, 1989, the Texas Court of Criminal Appeals denied the Petitioner's request for a writ of habeas corpus. A true and correct copy of the order of the Texas Court of Criminal Appeals is likewise attached hereto in the Appendix.
7. Since the Texas Court of Criminal Appeals vacated the stay of execution, which had previously been entered pending its decision on the application for writ of habeas corpus, the trial court has now sentenced the Petitioner to be executed on August 3, 1989.

STATEMENT OF GROUNDS OF JURISDICTION

1. Jurisdiction is conferred on this Court by the provisions of 28 U.S.C. 1257, 18 U.S.C. 3772, and Rule 17, Revised Rules of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S. Const. Amend. XIV, Sec. 1.

2. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Constitution Amendment VI.

STATEMENT OF THE CASE

The Petitioner was charged by indictment with the offense of capital murder. At the jury selection stage of the trial, the prosecution exercised four of its twelve peremtory challenges against black venire persons. The Petitioner is black and, by reason of the State's exercise of its peremtory challenges against the black venire persons, no blacks served on the petit jury.

The four black venire persons who were struck by the State include Ms. Audrey Dorsey, Ms. Perlie Doze, Ms. Ruthie Hines, and Ms. Gloria Price.

For reasons stated in more detail in the findings of fact made by the trial court, prosecutor Keno Henderson articulated certain reasons for exercising peremtory challenges against Ms. Dorsey, Ms. Doze, and Ms. Hines that the court found to be race-neutral.

However, during his testimony at the Batson hearing, Assistant District Attorney Henderson testified as follows:

1. Testimony regarding Audry Dorsey - pursuant to cross-examination by Petitioner's counsel relative to his thought processes in regard to the decision to strike Ms. Dorsey, the following testimony of Assistant District Attorney Henderson transpired:

Q. You know, I am not attacking you, but I have to try to pin you down. When you say you felt a little uneasy about her generally, was it your considered opinion that the fact that she was black and that the Defendant was black might have some factor or might be some factor in her decision-making process?

A. I was not complete satisfied that it would not, but that was my uneasiness.

Q. So in addition to other factors, there was some uneasiness in your mind and your thought processes about the fact that she was black and Mr. Wilkerson was black?

A. Well, no, about the questions in general. But, yeah, about the fact that she was black and the Defendant was black.

2. Examination Regarding Ms. Perlie Doze - under cross-examination regarding his reasons for exercising a peremtory challenge in regard to Ms. Doze, Mr. Henderson testified as follows:

Q. But, beyond these equivocal answers that you got and these concerns that you had, did it additionally concern you to some extent that she was black and Mr. Wilkerson was black and that that might, and she worked in a lounge that you thought of as being not on the up and up?

A. The only thing I thought perhaps that might come into play would be where when she made the statement he is a nice, young man. I thought perhaps she might make some identification, I guess, with the Defendant to some extent, but.

Q. Based on being of the same race?

A. Yeah, that is just a factor.

Additionally, Mr. Henderson further testified as follows on re-direct examination by the State regarding venire person Perlie Doze:

Q. Mr. Henderson, isn't it a fact that many of the State's witnesses were also black witnesses; is that correct?

A. Yes, that is true, as I recall.

Q. And that any consideration that you just mentioned that you might have given between the feeling of identity between Ms. Doze and the Defendant would also work in your favor with regard to your black State's witnesses; is that correct?

A. Well, that is true.

Q. And that that was not a major consideration or the sole consideration for your striking Ms. Doze?

A. One of the many considerations but nothing major about that.

REASONS FOR GRANTING THE WRIT

1. THE FINDINGS OF THE TRIAL COURT IN REGARD TO THE PETITIONER'S APPLICATION FOR A WRIT OF HABEAS CORPUS AND THE ACCEPTANCE BY THE TEXAS COURT OF CRIMINAL APPEALS OF THOSE FINDINGS WITHOUT CONSIDERATION OF THE CLEAR ADMISSION OF THE PROSECUTOR THAT RACIAL CONSIDERATIONS WERE A FACTOR IN HIS EXERCISE OF HIS PEREMTORY CHALLENGES AGAINST THE PROSPECTIVE BLACK VENIRE PERSONS SHOW A CONSCIOUS DISREGARD FOR THE FACT THAT RACE WAS A CONSIDERATION AND A FACTOR IN REGARD TO THE EXERCISE OF THE STATE'S PEREMTORY CHALLENGES. THIS IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND OF THE IMPARTIAL JURY CLAUSE OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In its attempt to fairly interpret the Equal Protection

Clause of the United States Constitution, this Court has previously stated that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." Swain v. Alabama, 380 U.S.at 203-204. Likewise, a black criminal defendant has the right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria and this guarantee mandates an Equal Protection review of the State's privilege to strike individual jurors through peremtory challenges. Batson v. Kentucky, 476 U.S.at 1718 Martin v. Texas, 200 U.S. 316, 26 S.Ct. 338, 50 L.Ed.497 (1906).

It is likewise asserted that this Court should consider the issue of whether the Petitioner's right to an impartial jury, guaranteed by the Sixth Amendment, has also been infringed by the use of race as a criterion used by the prosecution in exercising its peremtory challenges.

In Batson, this Court stated that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on the account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black Defendant." Batson 476 U.S.at 1719. Clearly, the prosecutor in Petitioner's case indicated that race was a factor in his consideration of the potential jurors and that he had concerns, relative to his challenge of Ms. Dorsey, about "the fact that she was black and the Defendant was black." This is exactly the type of global presumption that the Constitution forbids.

Perhaps no other court has stated the constitutionally mandated concept of totally race-neutral factors in jury selection more clearly than the Court of Appeals of Texas for the First Supreme Judicial District in Houston when it stated in the case of Speaker v. State the following: "While we realize that it may be unrealistic to expect the prosecutor to put aside every

improper influence when selecting a juror, we conclude that that is exactly what the law requires. Thus, a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure." Speaker v. State, 740 S.W.2d 486, 489 (Tex. App.-Houston (1st Dist.) 1987, no writ).

No influence is more destructive of justice in a particular case nor more detrimental to the entire system of criminal justice than the use of racial categories and characterizations in jury selection. When such racial considerations are shown to have played any significant part in the State's decision to exercise its peremtory challenges in the most serious of all cases, this Court must exercise its discretion to review and correct such abuses.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Texas Court of Criminal Appeals.

Respectfully submitted,

SHULTS, HETHERINGTON & TABICS

BY: Robert A Shults

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Counsel for Petitioner

APPENDIX

Containing the following materials:

1. Findings of Fact and Conclusions of Law signed by the District Court relative to the hearing on Petitioner's application for a writ of habeas corpus.
2. Petitioner's Proposed Findings of Fact and Conclusion of Law submitted to the District Court.
3. Order of the Texas Court of Criminal Appeals refusing Petitioner's application for writ of habeas corpus.

EX PARTE RICHARD JAMES WILKERSON
WRIT NO. 17,443-02

Habeas Corpus Application from HARRIS County

O R D E R

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

The record reflects that on January 7, 1984, applicant was convicted of the offense of capital murder. Punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Wilkerson v. State, 726 S.W.2d 542 (Tex.Crim.App. 1986).

In the instant cause, applicant presents five allegations in which he seeks to challenge his conviction and resulting sentence. The trial court held an evidentiary hearing and entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record with respect to the allegations now made by applicant and finds the findings of fact and conclusions of law entered by the trial court are supported by the record.

The relief sought is denied on the basis of the trial court's findings of fact and conclusions of law and the stay of execution entered by this Court on September 18, 1987, is vacated.

IT IS SO ORDERED THIS THE 15TH DAY OF MAY, 1989.

PER CURIAM

En banc
Do Not Publish
Teague, J., dissents

CAUSE NO. 383749-A
WRIT NO. 17,443-02

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
RICHARD JAMES WILKERSON Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having considered the evidence adduced at the hearing held February 26, 1988, in the above-referenced cause (hereinafter referred to as "hearing"), as well as the official court records concerning said conviction, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Richard James Wilkerson, was charged by indictment in Cause No. 383749 for the felony offense of capital murder.

2. The applicant was found guilty by a jury in Cause No. 383749 for the offense of capital murder; after the jury affirmatively answered the special issues, the trial court assessed punishment at death by lethal injection.

3. The Court of Criminal Appeals affirmed the conviction on direct appeal in an opinion delivered May 14, 1986. **Wilkerson v. State**, 726 S.W.2d 542 (Tex. Crim. App. 1986).

4. Relying on the United States Supreme Court's holding in **Batson v. Kentucky**, 476 U.S. 79, 106 S.Ct. 1712 (1986), the applicant filed a postconviction writ of habeas corpus in which he alleged that the State systematically struck all blacks from the

jury panel through the use of peremptory challenges.

5. Because the applicant's conviction in Cause No. 383749 was not yet final at the time Batson was delivered, the Court of Criminal Appeals, on September 17, 1987, remanded the cause to the trial court for a hearing on the issue and stayed the applicant's execution pending further orders of the Court. See Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1986).

6. The applicant is a member of an identifiable minority, i.e. black.

7. There were no blacks on the jury that found the applicant guilty in Cause No. 383749 and affirmatively answered the special issues.

8. Four of the State's twelve peremptory challenges were exercised against the following black venirepersons: Audrey Dorsey, Perlie Doze, Ruthie Hines,and Gloria Price.

9. Prosecutors Keno Henderson and Mary Milloy alternated conducting individual voir dire of the members of the venire. Although the prosecutors consulted each other concerning the exercising of peremptory challenges, the view of the prosecutor who conducted the individual voir dire was given more credence (R. I-29).

10. The court finds that prosecutor Henderson's general strategy in selecting a capital jury, including the jury in the instant case, is to accept the first twelve people who he believes can return a death penalty verdict based on the facts of the case (R. I-35).

11. In the instant case, prosecutor Henderson looked for a juror who was (a) intelligent; (b) articulate; (c) able to understand the issues; and, (d) lacked any pre-conceived notions of the death penalty which would interfere with the ability to apply the death penalty (R. I-31-32).

12. In the case at bar, prosecutor Milloy looked for a juror who was (a) bright and (b) articulate (R. I-104).

13. The court finds that the method of jury selection employed by prosecutor Henderson and prosecutor Milloy is race-neutral and does not utilize race, creed or color as a means of purposefully or deliberately denying jury participation to any person, including black persons.

14. Prosecutor Henderson exercised a peremptory challenge against Audrey Dorsey for the following race-neutral reasons:

(a) Ms. Dorsey's initial statements concerning the death penalty indicated that she would have difficulty assessing the death penalty even in an appropriate case;

(b) Ms. Dorsey statements, concerning her belief that some persons who commit murder are not responsible for their actions, led the prosecutor to believe that Ms. Dorsey would hold the State to a higher burden of proof than set by law, namely, to prove that the accused was a responsible person;

(c) Ms. Dorsey indicated that she had strong

opinions and that she did not easily change her mind once she made a decision, causing the prosecutor to think that Ms. Dorsey would be unable to engage in deliberation as a juror;

(d) Ms. Dorsey indicated that she could not consider the full range of punishment, namely, the minimum punishment for murder;

(e) Ms. Dorsey indicated that she would have to be certain that a person who gave a confession was of sound mind at the time he gave the confession, indicating that she would require the State to prove the soundness of the accused's mind at the time of his confession;

(f) Ms. Dorsey indicated that she believed that a confession should be taken in the presence of an individual other than a police officer, prompting the prosecutor to infer that Ms.Dorsey had some problem concerning police officers and their credibility;

(g) Ms. Dorsey indicated that the she would have to believe that the confession was actually true before she would consider it as evidence, leading the prosecutor to think that any inconsistency in any part of the confession would prompt Ms. Dorsey to disregard the entire confession;

(h) Ms. Dorsey indicated that she did not think that it was possible to answer the second special issue, because she did not think that she could predict the future;

(i) Ms. Dorsey did not think that the second special issue was an appropriate issue to consider when determining the imposition of the death penalty;

(j) during the course of the voir dire, the prosecutor developed the feeling that he had irritated Ms. Dorsey and that poor rapport existed between him and Ms. Dorsey.

(R. I-36-46).

15. Prosecutor Henderson exercised peremptory challenge against Perlie Doze for the following race-neutral reasons:

(a) Ms. Doze's spelling and apparent difficulty completing the juror information form indicated some difficulty in understanding the written language, causing the prosecutor concern as to whether Ms. Doze could understand the issues of the case;

(b) Ms. Doze had difficulty answering fairly straightforward and simple questions;

(c) Ms. Doze's employment as a cashier at the Delia Lounge, a place known to the prosecutor for not attracting law-and-order type customers, caused

the prosecutor some concern;

(d) the fact that Ms. Doze first said that she could not consider the death penalty and then quickly stated that she did not understand the question led the prosecutor to think that Ms. Doze did not grasp what the prosecutor was saying;

(e) Ms. Doze indicated that she had a religious feeling about the death penalty and that she thought a person should be given a second chance, prompting the prosecutor to believe that Ms. Doze would never be able to assess the death penalty;

(f) Ms. Doze's comment that she thought the applicant was a nice young man caused the prosecutor to believe that Ms. Doze would be unable to assess the death penalty for someone whom she thought was a nice young man;

(g) Ms. Doze expressed bewilderment that anyone with normal sense could have done such a crime, causing the prosector to worry that Ms. Doze would question whether the applicant was insane or incompetent;

(h) Ms. Doze indicated that she thought the applicant was guilty, but she then stated that she could still presume the applicant to be

innocent, leading the prosecutor to the conclusion that Ms. Doze did not understand the proceedings;

(i) Ms. Doze's responses throughout the voir dire caused the prosecutor to think that Ms. Doze did not understand the proceedings and issues and that she did not have the intellectual ability to make a decision in the instant case..

(R. I-64-71).

16. Prosecutor Henderson exercised a peremptory challenge against Ruthie Hines for the following race-neutral reasons:

(a) Mrs. Hines' job as a cashier in a liquor store caused the prosecutor some concern because of the type of business;

(b) Mrs. Hines' husband was unemployed at the time of voir dire and had been unemployed for eight or nine months; Mrs. Hines, who had two jobs, was the sole support of her family consisting of her husband and two children, prompting the prosecutor to doubt Mrs. Hines' ability to concentrate on the evidence if she were worried about her family's financial needs;

(c) Mrs. Hines indicated that she favored a life sentence rather than a death penalty, although she later stated that a person ought to be given the death penalty, causing the prosecutor

to believe that Mrs. Hines' first response was more valid;

(d) Mrs. Hines felt that her assessing the death penalty was morally wrong, leading the prosecutor to think that Mrs. Hines would be unable to assess the death penalty;

(e) Mrs. Hines indicated that she believed that a defendant would tell the truth, causing the prosecutor to think that Mrs. Hines would believe the applicant if he testified and related things differently than he did in his confession, namely, that he was not guilty;

(f) as a result of the entire voir dire of Mrs. Hines, the prosecutor thought that Mrs. Hines did not really understand what was happening, that she would not be able to make an intelligent, informed decision concerning the case, and that she would not be able to assess the death penalty.

(R. I-79-83).

17. Prosecutor Mary Milloy exercised a peremptory challenge against Gloria Price for the following race-neutral reasons:

(a) Mrs. Price expressed reservations against the death penalty at the outset of voir dire and indicated that she would prefer to assess a life sentence, but she was never able to

articulate her reservations concerning the death penalty;

(b) Mrs. Price stated that she had never thought about the death penalty, causing the prosecutor concern about an individual who had not devoted any previous thought to the death penalty process;

(c) there was an apparent communication problem between the prosecutor and Mrs. Price, which resulted in Mrs. Price sometimes giving unresponsive answers, causing the prosecutor to think that Mrs. Price either did not understand or that she was simply saying what she thought the prosecutor wanted to hear;

(d) Mrs. Price's employment as a lab assistant or technician in a hospital prompted the prosecutor to think that she would tend to see her function as more life-sustaining or life-giving as opposed to sentencing a person to death;

(e) the age of Ms. Price's children caused the prosecutor concern, since the applicant was nineteen years old;

(f) the prosecutor did not think that Ms. Price understood some of the legal explanations which the prosecutor gave.

(R. I-99-105).

18. The court finds that the State did not systematically exclude black persons from the jury in the instant case.

19. The court also finds that the State's explanations for peremptorily striking Audrey Dorsey, Perlie Doze, Ruthie Hines, and Gloria Price were neutral, unambiguous and non-racial reasons relative to the applicant's case, as required by the holding of Batson, id. The court further finds that the State's explanations are credible, plausible and legitimate reasons for exercising those peremptory challenges.

CONCLUSIONS OF LAW

1. This court concludes that the defense made a prima facie showing of discrimination by the State in the jury selection process (R. I-27).

2. This court further concludes that the prosecutors in the instant case did not exercise peremptory challenges in a discriminatory manner to exclude venirepersons based upon racial considerations, nor did they, in any way, purposefully or deliberately deny jury participation to black persons because of race.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in Cause No. 383749-A and transmit same to the Court of Criminal Appeals as provided by the Texas Code of Criminal Procedure. The transcript shall include the following:

1. the entire appellate record in Cause No. 383749, including the Statement of Facts, transcript and appellate opinions;
2. the application for writ of habeas corpus;
3. the Respondent's answer;
4. the Order of the Court of Criminal Appeals delivered on September 17, 1987;
2. the transcript of the Batson hearing held February 26, 1988 and exhibits thereto;
3. the Applicant's Proposed Findings of Fact and Conclusions of Law;
4. the Respondent's Proposed Findings of Fact and Conclusions of Law and Order.

THE CLERK is further ORDERED to send a copy of the Respondent's Proposed Findings of Fact and Conclusions of Law and Order to the applicant's counsel: Robert A. Shults, 1800 West Loop South, Suite 950, Houston, Texas 77027.

PRESIDING JUDGE

WRIT NO. 17,443-02

CASE NO. 383749

EX PARTE	IN THE DISTRICT COURT OF
RICHARD JAMES WILKERSON,	HARRIS COUNTY, T E X A S
APPLICANT	179TH JUDICIAL DISTRICT

FINDING OF FACT AND CONCLUSIONS OF LAW

The Applicant has filed his writ of habeus corpus alleging that the State utilized its peremptory jury challenges at his trial in violation of the United States Constitution as delineated in the case of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). This Court held an evidentiary hearing on January 15, 1988 in regard to the Applicant's allegations. The following Findings of Fact and Conclusions of Law are set forth as a result of that hearing:

I.

The Applicant's allegations are that three black persons were veniremen in regard to the selection of his jury and that all three black veniremen were struck by the State peremptorily. This Court so found and further ruled that the Applicant had made a prima facie showing of discrimination pursuant to Batson as reflected on page 27 of the Statement of Facts relative to the writ hearing.

II.

Assistant District Attorney Keno Henderson was called by the State at the hearing and testified that, while the decision to strike a prospective juror peremptorily on the part of the State was a "joint decision" between he and his second chair counsel, Ms. Mary Milloy,

> ...a little more credence was given to the individual that talked to that person (prospective juror) because we felt like they would have a better feeling I guess whether or not they had any rapport with that person or that person was going to believe anything that the prosecutor might have to say. (SF 29-30)

III.

The State further examined Mr. Henderson and the Applicant cross-examined Mr. Henderson regarding the black prospective jurors that he examined and struck during voir dire examination which were Ms. Audrey Dorsey, Ms. Perlie Doze and Ms. Ruthie Hines.

IV.

The Court finds that Mr. Henderson's testimony was candid and truthful and that he delineated various reasons for striking the prospective jurors about which he testified.

V.

However, Mr. Henderson testified as follows regarding the existence of race as a factor in his decision and specifically in regard to the fact that the Defendant was black and the prospective jurors were likewise black.

(a) Testimony Regarding Audrey Dorsey--Under cross-examination by Applicant's counsel relative to his thought processes in regard to the decision to strike Audrey Dorsey, the following transpired:

Q. You know, I am not attacking you, but I have to try to pin you down. When you say you felt a little uneasy about her generally, was it your considered opinion that the fact that she was black and that the Defendant was black might have some factor or might be some factor in her decision-making process?

A. I was not completely satisfied that it would not, but that was my uneasiness.

Q. So in addition to other factors, there was some uneasiness in your mind and your thought processes about the fact that she was black and Mr. Wilkerson was black?

A. Well, no, about the questions in general. But, yeah, about the fact that she was black and the Defendant was black. (SF 52-53)

(b) Examination Regarding Perlie Doze--under cross-examination regarding his reasons for striking Perlie Doze, Mr. Henderson testified as follows:

Q. But, beyond these equivocal answers that you got and these concerns that you had, did it additionally concern you to some extent that she was black and Mr. Wilkerson was black and that that might, and she worked in a lounge that you thought of as being not on the up and up?

A. The only thing I thought perhaps that might come into play would be where when she made the statement he is a nice, young man. I thought perhaps she might make some

identification, I guess, with the Defendant to some extent, but.

Q. Based on being of the same race?

A. Yeah, that is just a factor. (SF 75)

Additionally, Mr. Henderson further testified as follows on re-direct examination regarding veniremen Perlie Doze:

Q. Mr. Henderson, isn't it a fact that many of the State's witnesses were also black witnesses; is that correct?

A. Yes, that is true, as I recall.

Q. And that any consideration that you just mentioned that you might have given between the feeling of identity between Ms. Doze and the Defendant would also work in your favor with regard to your black State's witnesses; is that correct?

A. Well, that is true.

Q. And that that was not a major consideration or the sole consideration for your striking Ms. Doze?

A. One of the many considerations but nothing major about that. (SF 75-76)

VI.

The Court therefore finds that, although Mr. Henderson delineated reasons other than race for striking Ms. Dorsey and Ms. Doze as prospective jurors, he admitted that the race of the Defendant and the race of the veniremen was of some consideration in his decision to strike these prospective jurors.

CONCLUSIONS OF LAW

I.

The Court of Appeals of Texas for the First Supreme Judicial District in Houston stated in the case of Speaker v. State, 740 S.W.2d 486 the following:

> While we realize that it may be unrealistic to expect the prosecutor to put aside every improper influence when selecting a juror, we conclude that that is exactly what the law requires. Thus a prosecutor's admission that race was an influencing factor in the selection process vitiates the legitimacy of the entire procedure. Id. at 489

II.

Additionally, as stated in Judge Teague's concurring opinion in Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988),

> Of course, if the prosecutor admits that the reason he exercised a peremptory strike on a member of the same race as the Defendant, his candor will unquestionably cause him to fail in satisfying his burden of proof to rebut the Defendant's prima facie case. Id. at 877.

In the instant case, although Mr. Henderson delineated other reasons which were also factors in his decision to strike the jurors as described in the foregoing Statement of Facts, he unequivocally stated that race was one of the "many considerations" that he utilized and that race was likewise "a factor" in his decision.

III.

Therefore, the Court must conclude that the common race of the Applicant and the jurors struck peremptorily by the State was a factor in the prosecutor's decision to exercise his peremptory

challenges and the Court must therefore recommend to the Court of Criminal Appeals that the Applicant's writ of habeus corpus be granted and that his conviction be reversed.

Signed this _____ day of _____, 1989.

_____
Judge, 179th Judicial District

682:87222:19:RAS

NO. 89-5072

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

RICHARD JAMES WILKERSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE PROSECUTOR'S EXPLANATION FOR THE PEREMPTORY CHALLENGES TO BLACK VENIRE MEMBERS SATISFIED THE REQUIREMENT OF BATSON THAT THEY BE RACIALLY NEUTRAL AND RELATED TO THE CASE TO BE TRIED.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

NO. 89-5072

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent[1] herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals denying Wilkerson's state habeas application is not published, and is reproduced and attached hereto as Appendix A. The opinion of the Texas Court of Criminal Appeals affirming Wilkerson's conviction is reported at 726 S.W.2d 542 (Tex. Crim. App. 1986).

[1]For clarity, the Respondent is referred to as "the state," and Petitioner as "Wilkerson."

JURISDICTION

Wilkerson seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Wilkerson bases his claim upon the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

Wilkerson was indicted on July 12, 1983, in the 179th District Court of Harris County, Texas, for the capital murder of Anil Varughese, during the course of committing and attempting to commit the offense of robbery. On January 6, 1983, he was found guilty of the charged offense by a jury, and after a separate punishment hearing, the jury affirmatively answered the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1989) on January 7, 1984. Punishment was assessed at death as required by law. The Texas Court of Criminal Appeals affirmed the conviction and sentence on May 14, 1986. Wilkerson v. State, 726 S.W.2d 542 (Tex. Crim. App. 1986). Wilkerson's motion for rehearing was denied on September 24, 1986. This Court denied certiorari review on March 23, 1987. Wilkerson v. Texas, ___ U.S. ___, 107 S.Ct. 1590 (1987).

On June 11, 1987, the trial court scheduled Wilkerson's execution for August 18, 1987. On August 13, 1987, Wilkerson filed an application for state writ of habeas corpus in the trial court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon Supp. 1989).[2] The trial court then modified Wilkerson's execution date to September 22, 1987. On September 11, 1987, the trial court entered findings of fact and conclusions of law,

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[2]This writ application, although signed by Wilkerson appearing pro se, was apparently prepared by Wilkerson's appellate counel, C. Logan Dietz, and the Harris County District Clerk wrote a letter to Mr. Dietz on August 13, 1987, acknowledging receipt of the writ application. After filing a motion to withdraw the execution date, Mr. Dietz withdrew from any further representation of Wilkerson, and Robert Shults was appointed by the trial court to represent Wilkerson.

recommended that relief be denied and forwarded the application to the Court of Criminal Appeals. However, that court on September 18, 1987, granted a stay of execution and remanded the case for an evidentiary hearing on Wilkerson's claim that the state's use of its peremptory challenges was discriminatory. After holding the hearing, the trial court entered factual findings and legal conclusions, recommended that relief be denied, and forwarded the writ to the Court of Criminal Appeals, which denied the writ on the basis of the trial court's findings. Ex parte Wilkerson, No. 17,443-02 (Tex.Crim.App. May 15, 1989).

On June 9, 1989, the trial court rescheduled Wilkerson's execution for August 3, 1989. At the scheduling hearing, Wilkerson's counsel, Robert Shults, announced his intention to withdraw as counsel of record upon his filing of a petition for writ of certiorari from the denial of state habeas relief. Also at the hearing was Eden Harrington from the Texas Resource Center, who announced that the Center was unable to represent Wilkerson, that it did not then have a volunteer attorney for him, and that it needed additional time to recruit an attorney to represent him.

On July 11, 1989, Wilkerson filed the instant petition for writ of certiorari seeking review of the Court of Criminal Appeals denial of state habeas relief.

STATEMENT OF FACTS

The facts of the offense are not relevant to the questions presented to the Court.

In his state habeas action, Wilkerson alleged for the first time that his equal protection rights were violated by the state's exercise of its peremptory challenges to remove black venire members from the jury. Wilkerson did not object to state's use of its peremptory challenges on this basis at trial, and as a consequence, the trial court found that he had waived this claim and recommended that relief be denied. However, the Texas Court of Criminals remanded the cause to the trial court and ordered an evidentiary hearing to allow Wilkerson to more

fully develop the factual basis for his claim. The findings of fact entered by the trial court at the conclusion of the retrospective Batson hearing, and expressly adopted by the Texas Court of Criminal Appeals in denying relief, are relevant to the determination of Wilkerson's Batson claim in the instant petition for certiorari review. They are attached hereto as Appendix B.

SUMMARY OF ARGUMENT

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Wilkerson has advanced no special and important reason in this case and none exists.

Review of Wilkerson's challenge to the state's use of peremptory challenges to exclude black venire members is foreclosed by his failure to object on that basis at trial. Alternatively, the record reflects that the court below correctly applied the well settled constitutional standard enunciated in Batson v. Kentucky to the facts of the instant case and determined that the prosecutor had neutral reasons, related to the case to be tried, for exercising each of the peremptory challenges questioned by Wilkerson.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of sound discretion, and will be granted only when there are special or important reasons therefor. Wilkerson has advanced no special or important reason in this case and none exists. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important questions of law to justify this Court's exercise of its certiorari jurisdiction.

II.

THE PEREMPTORY CHALLENGES QUESTIONED BY WILKERSON WERE EXERCISED FOR REASONS WHICH WERE BOTH NEUTRAL AND RELATED TO THE CASE TO BE TRIED, AND THUS SATISFIED THE MANDATE OF BATSON.

Wilkerson claims that his equal protection rights were violated by the prosecutor's exercise of three peremptory challenges to exclude venire members Audry Dorsey, Perlie Doze, Ruthie Hines, and Gloria Price from the petit jury. He specifically claims that the prosecutor's explanation for the challenges to venire members Dorsey and Doze reflects that they were exercised in part for reasons of race. Thus, he concludes the state courts erred when they found that the challenges were exercised for reasons which were "neutral, unambiguous and non-racial."

A criminal defendant who is a member of a racial minority is denied equal protection when the state, with the intent to purposefully discriminate against members of the defendant's race, exercises its peremptory challenges to remove members of that race from the petit jury. Batson v. Kentucky, 476 U.S. 79 (1986). In Batson, the Court relaxed the evidentiary burden which a number of lower courts understood Swain v. Alabama, 380 U.S. 202 (1965), to place on a minority criminal defendant who sought to establish that he had been denied equal protection by the state's exercise of its peremptory challenges. Batson 476 U.S. at 82. Under Batson, a defendant can establish a prima facie case of racial discrimination in the prosecutor's exercise of peremptory challenges solely on the facts of his case; and once he has established a prima facie case, the burden shifts to the state to come forward with an explanation for the exclusions which is both neutral and related to the particular case to be tried. Id. at 97.

After the prosecutor has articulated a neutral reason which is related to the particular case, the trial court must determine "if the defendant has established purposeful discrimination." Batson, 476 U.S. at 98 (emphasis added). With respect to this final determination Batson mandates only that the court evaluate

the credibility of the proffered explanation in light of the defendant's evidence of discriminatory exercise of peremptory challenges. While a mere affirmation of good faith is insufficient, the prosecutor's explanation need not rise to the level justifying a challenge for cause. Batson v. Kentucky, 476 U.S. at 98.

Under Batson both the ultimate determination whether the defendant has established purposeful discrimination, as well as the explanations of the prosecutor credited by the trial court in making the determination, are factual findings entitled to great deference on review. Id. at 98 n.21, citing Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). In federal habeas review, such factual determinations of a state trial or appellate court are entitled to a presumption of correctness under 28 U.S.C. § 2254 (d).

A. This Court is without jurisdiction to review Wilkerson's challenge to the state's exercise of its peremptory challenges since the decision of the court below rests on the adequate and independent state grounds of a procedural bar.

This Court is without jurisdiction to review Wilkerson's Batson claim since the decision of the court below rests on adequate and independent state grounds. Wilkerson presented six grounds for relief in the state habeas application. The trial court's initial findings of fact and conclusions of law, entered September 11, 1987, pertained to all six grounds. The trial court found therein that Wilkerson had waived his right to review under Batson by his failure to timely object to the state's use of peremptory challenges. Without accepting or rejecting any of the trial court's findings, the Court of Criminal Appeals remanded the case for a hearing to allow Wilkerson to develop facts pertaining to the exclusion of the Black venire members. Following the Batson hearing, the trial court entered factual findings in which it set forth the prosecutor's racially neutral reasons for the peremptory challenges. The Court of Criminal Appeal's subsequent denial of relief, based on the trial court's findings

of fact and conclusions of law, necessarily encompassed both sets of factual findings and legal conclusions entered by the trial court. Thus, the denial of relief by the court below rests on alternative bases, first, that the claim is procedurally barred by the failure to object, and second, that the peremptory challenges were exercised for racially neutral reasons. "The adequate and independent state ground doctrine requires the federal court to honor a state holding that is sufficient basis for the state court's judgment, even when the state court also relies on federal law." Harris v. Reed, ___ U.S. ___, ___, 109 S.Ct. 1038, 1044 n.10 (1989), citing Fox Film Corp. v. Muller 296 U.S. 207, 210 (1935).

Wilkerson's failure to object cannot be excused on the ground that Batson delineated a constitutional principle so novel that it could not reasonably have been anticipated at the time of his trial. See Reed v. Ross, 468 U.S. 1 (1984). The equal protection right at issue in Batson was first delineated in Swain v. Alabama, 380 U.S. 202 (1965); the Batson Court merely reexamined the portion of Swain concerning the evidentiary burden placed on a defendant who seeks to establish a violation of this right. Batson v. Kentucky, 476 U.S. at 82.

B. Wilkerson's challenge is foreclosed by Batson's requirement that he have objected at trial to the state's exercise of its peremptory challenges to exclude Blacks.

This Court's opinion in Batson makes it clear that an objection is required to preserve the alleged error for review.

> In this case, petitioner made a timely objection to the prosecutor's removal of all black person on the venire. Because the trial court flatly rejected the objection without requiring the prosecutor to give an explanation for his action, we remand this case for further proceedings.

Id. at 100 (emphasis added); id. at 101 (White, J., concurring: "If the defendant objects, the judge, in whom the Court puts considerable trust, may determine that the prosecution must respond"). The Fifth Circuit Court of Appeals has held that, as a matter of federal law, in order to be entitled to relief on a

Batson claim, a defendant must be "similarly situated" to Batson and, therefor, must have lodged a contemporaneous objection to the use of peremptory challenges to exclude jurors on the basis of race. Thomas v. Moore 866 F.2d 803 (5th Cir. 1989); Jones v. Butler 864 F.2d 348 (5th Cir. 1989) (on rehearing); United States v. Irwin, 793 F.2d 656 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S.Ct. 589 (1987) (relying on the contemporaneous objection requirement emanating from Batson rather than federal rules of procedure, the court held that review of the defendant's Batson claim was procedurally barred by his failure to object).

C. The prosecutor's explanation of the peremptory challenges to venire members Dorsey and Doze reflect that his reasons were racially neutral and related to the case to be tried.

In its findings of fact and conclusions of law entered in response to Wilkerson's state habeas application, the trial court delineated the neutral explanations offered by the prosecutor for each of the four peremptory challenges and determined that the peremptory challenges did not reflect purposeful discrimination. Ex parte Wilkerson, Application No. 17,443 (Attached hereto as Appendix B). The trial court's determinations are fully supported by the evidence adduced at the Batson hearing and the voir dire.

Wilkerson asserts that this court should reassess the factual determinations of the trial court and find that the peremptory challenges to venire members Dorsey and Doze in fact reflected purposeful discrimination on the part of the prosecutor. He thus asks this court to disregard the deference to be accorded such determinations under both Batson and 28 U.S.C. § 1154 (d).[3] In a federal habeas action, the factual determinations of a state court may be disregarded under to 28 U.S.C. § 2254 (d) (8) only if the determinations "are not fairly

[3]It is appropriate to accord the trial court's determinations the deference to which they would be entitled under 28 U.S.C § 2254 (d), since Wilkerson chose to forgo federal habeas review and apply directly to this Court for certiorari review of his state habeas action.

supported by the record." "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even 'fair support' in the record." Marshall v. Lonberger, 459 U.S. 422, 432 (1983). In the instant case, the trial court's determinations are fully supported by the record and were made with full knowledge of the factors which Wilkerson urges require a different outcome. There is no basis for not deferring to the trial court's determinations.

The portions of the Batson hearing, which Wilkerson argues reflect the prosecutor's discriminatory intent, in fact reflect only the prosecutor's recognition that a minority juror's identification with a minority defendant may in some instances result in the juror's being biased against the state's case. The prosecutor's lengthy explanation of his peremptory challenges to Dorsey and Doze makes it clear that the challenges were not based on an assumption that they would exhibit such bias. The prosecutor not only proffered numerous neutral explanations for the challenges but affirmed that both Dorsey and Doze would have been excused regardless of their race. Batson does not preclude excluding a black venire member who would favor a black defendant; it merely precludes such an exclusion when it is based solely "on the assumption--or [the prosecutor's] intuitive judgment--that [the black venire member] would be partial to the defendant because of their shared race." Batson v. Kentucky, 476 U.S. at 97; see also Turner v. Murray, 476 U.S. 28 (1986) (a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias). Batson does not establish in a minority defendant an affirmative right to jurors who are biased against the state's case.

Wilkerson has not satisfied his burden of demonstrating that the peremptory challenges at issue reflected pu poseful discrimination on the part of the prosecutor. There is no basis for not

deferring to the trial court's factual determination that the challenges were exercised for racially neutral reasons.

CONCLUSION

For the foregoing reasons, the state respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

EX PARTE RICHARD JAMES WILKERSON
WRIT NO. 17,443-02

Habeas Corpus Application from HARRIS County

O R D E R

This is a post-conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.07, V.A.C.C.P.

The record reflects that on January 7, 1984, applicant was convicted of the offense of capital murder. Punishment was assessed at death. This Court affirmed applicant's conviction on direct appeal. Wilkerson v. State, 726 S.W.2d 542 (Tex.Crim.App. 1986).

In the instant cause, applicant presents five allegations in which he seeks to challenge his conviction and resulting sentence. The trial court held an evidentiary hearing and entered findings of fact and conclusions of law and recommended the relief sought be denied. This Court has reviewed the record with respect to the allegations now made by applicant and finds the findings of fact and conclusions of law entered by the trial court are supported by the record.

The relief sought is denied on the basis of the trial court's findings of fact and conclusions of law and the stay of execution entered by this Court on September 18, 1987, is vacated.

IT IS SO ORDERED THIS THE 15TH DAY OF MAY, 1989.

PER CURIAM

En banc
Do Not Publish
Teague, J., dissents

NO. 383,749A

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
RICHARD JAMES WILKERSON	§	HARRIS COUNTY, TEXAS

RESPONDENT'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Having reviewed the documents filed in cause number 383,749 and the official court records of the conviction challenged, the Court adopts as Findings of Fact the history of the case as set forth in Respondent's First Amended Answer. The court further finds that the facts asserted in the affidavits of Robert Scardino, Jr. and Ray Howard, filed September 3, 1987 true and that said facts together with the contents of official court records demonstrate that the totality of the representation afforded Applicant was sufficient to protect his right to reasonably effective assistance of counsel.

The Court also makes the following Findings of Fact and Conclusion of Law:

1. The applicant did not object to the prosecution's use of its peremptory challenges to strike blacks from the jury panel until the motion for new trial hearing.

2. The applicant waived his right to a Batson[1] hearing due to his procedural default in failing to timely object to the prosecution's use of its peremptory challenges.

3. Trial counsel's decision not to call Dorothy Winn, Jerry Poncia, and Polly Winn as character witnesses at the punishment hearing was a reasonable one, since they witnessed evidence that tended to incriminate the applicant in the robbery-murder.

4. Trial counsel conducted a reasonable investigation for character witnesses; and the witnesses named in the applicant's affidavits were either unknown to defense counsel, unavailable at the time of trial, or not called as a result of

[1] Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

ORDERED
13 Vol 49

78

sound trial strategy

[redacted] applicant's third ground for [redacted] veniremembers [redacted] previously raised on [redacted] rejected by the Court of Criminal Appeals.

6. The applicant's fourth ground for relief was decided adversely to the applicant by the Court of Criminal Appeals, on direct appeal, when it found Article 37.071, V.A.C.C.P. constitutionally acceptable.

7. The applicant failed to present any evidence showing a racially discriminatory purpose on the part of any of the decisionmakers in his particular trial.

8. The applicant's reference to statistics showing that more capital murder defendants are sentenced to death who kill white victims, than who kill black victims, does not demonstrate either an equal protection or Eighth Amendment violation.

Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS ORDERED to prepare a transcript and and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1) the application for writ of habeas corpus;

2) Respondent's Original Answer and First Amended Answer;

3) the court's order;

4) the indictment judgment and sentence in cause number 383,749 (unless they have been sent to the Texas Court of Criminal Appeals pursuant to a post-conviction writ of habeas corpus order);

5) the docket sheet in cause number 383,749;

6) ~~the entire appellate record in cause number 368,661, the statement of facts, the transcript and the appellant opinion in cause number 368,661~~;

7) the affidavit of Robert A. Scardino, Jr.;

8) the affidavit of Ray Howard;

10

79

9) the Applicant's and the Respondent's Proposed Findings of Fact and Conclusions of Law.

Signed this 11 day of September, 1987.

JUDGE PRESIDING
179th District Court
Harris County, Texas

Cause Number 383,749A

/sms

CAUSE NO. 383749-A
WRIT NO. 17,443-02

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
RICHARD JAMES WILKERSON Applicant	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having considered the evidence adduced at the hearing held February 26, 1988, in the above-referenced cause (hereinafter referred to as "hearing"), as well as the official court records concerning said conviction, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Richard James Wilkerson, was charged by indictment in Cause No. 383749 for the felony offense of capital murder.

2. The applicant was found guilty by a jury in Cause No. 383749 for the offense of capital murder; after the jury affirmatively answered the special issues, the trial court assessed punishment at death by lethal injection.

3. The Court of Criminal Appeals affirmed the conviction on direct appeal in an opinion delivered May 14, 1986. Wilkerson v. State, 726 S.W.2d 542 (Tex. Crim. App. 1986).

4. Relying on the United States Supreme Court's holding in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986), the applicant filed a postconviction writ of habeas corpus in which he alleged that the State systematically struck all blacks from the

jury panel through the use of peremptory challenges.

5. Because the applicant's conviction in Cause No. 383749 was not yet final at the time Batson was delivered, the Court of Criminal Appeals, on September 17, 1987, remanded the cause to the trial court for a hearing on the issue and stayed the applicant's execution pending further orders of the Court. See Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1986).

6. The applicant is a member of an identifiable minority, i.e. black.

7. There were no blacks on the jury that found the applicant guilty in Cause No. 383749 and affirmatively answered the special issues.

8. Four of the State's twelve peremptory challenges were exercised against the following black venirepersons: Audrey Dorsey, Perlie Doss, Ruthie Hines,and Gloria Price.

9. Prosecutors Keno Henderson and Mary Milloy alternated conducting individual voir dire of the members of the venire. Although the prosecutors consulted each other concerning the exercising of peremptory challenges, the view of the prosecutor who conducted the individual voir dire was given more credence (R. I-29).

10. The court finds that prosecutor Henderson's general strategy in selecting a capital jury, including the jury in the instant case, is to accept the first twelve people who he believes can return a death penalty verdict based on the facts of the case (R. I-35).

11. In the instant case, prosecutor Henderson looked for a juror who was (a) intelligent; (b) articulate; (c) able to understand the issues; and, (d) lacked any pre-conceived notions of the death penalty which would interfere with the ability to apply the death penalty (R. I-31-32).

12. In the case at bar, prosecutor Milloy looked for a juror who was (a) bright and (b) articulate (R. I-104).

13. The court finds that the method of jury selection employed by prosecutor Henderson and prosecutor Milloy is race-neutral and does not utilize race, creed or color as a means of purposefully or deliberately denying jury participation to any person, including black persons.

14. Prosecutor Henderson exercised a peremptory challenge against Audrey Dorsey for the following race-neutral reasons:

(a) Ms. Dorsey's initial statements concerning the death penalty indicated that she would have difficulty assessing the death penalty even in an appropriate case;

(b) Ms. Dorsey statements, concerning her belief that some persons who commit murder are not responsible for their actions, led the prosecutor to believe that Ms. Dorsey would hold the State to a higher burden of proof than set by law, namely, to prove that the accused was a responsible person;

(c) Ms. Dorsey indicated that she had strong

opinions and that she did not easily change her mind once she made a decision, causing the prosecutor to think that Ms. Dorsey would be unable to engage in deliberation as a juror;

(d) Ms. Dorsey indicated that she could not consider the full range of punishment, namely, the minimum punishment for murder;

(e) Ms. Dorsey indicated that she would have to be certain that a person who gave a confession was of sound mind at the time he gave the confession, indicating that she would require the State to prove the soundness of the accused's mind at the time of his confession;

(f) Ms. Dorsey indicated that she believed that a confession should be taken in the presence of an individual other than a police officer, prompting the prosecutor to infer that Ms.Dorsey had some problem concerning police officers and their credibility;

(g) Ms. Dorsey indicated that the she would have to believe that the confession was actually true before she would consider it as evidence, leading the prosecutor to think that any inconsistency in any part of the confession would prompt Ms. Dorsey to disregard the entire confession;

(h) Ms. Dorsey indicated that she did not think that it was possible to answer the second special issue, because she did not think that she could predict the future;

(i) Ms. Dorsey did not think that the second special issue was an appropriate issue to consider when determining the imposition of the death penalty;

(j) during the course of the voir dire, the prosecutor developed the feeling that he had irritated Ms. Dorsey and that poor rapport existed between him and Ms. Dorsey.

(R. I-36-46).

15. Prosecutor Henderson exercised a peremptory challenge against Perlie Doze for the following race-neutral reasons:

(a) Ms. Doze's spelling and apparent difficulty completing the juror information form indicated some difficulty in understanding the written language, causing the prosecutor concern as to whether Ms. Doze could understand the issues of the case;

(b) Ms. Doze had difficulty answering fairly straightforward and simple questions;

(c) Ms. Doze's employment as a cashier at the Delia Lounge, a place known to the prosecutor for not attracting law-and-order type customers, caused

the prosecutor some concern;

(d) the fact that Ms. Doze first said that she could not consider the death penalty and then quickly stated that she did not understand the question led the prosecutor to think that Ms. Doze did not grasp what the prosecutor was saying;

(e) Ms. Doze indicated that she had a religious feeling about the death penalty and that she thought a person should be given a second chance, prompting the prosecutor to believe that Ms. Doze would never be able to assess the death penalty;

(f) Ms. Doze's comment that she thought the applicant was a nice young man caused the prosecutor to believe that Ms. Doze would be unable to assess the death penalty for someone whom she thought was a nice young man;

(g) Ms. Doze expressed bewilderment that anyone with normal sense could have done such a crime, causing the prosector to worry that Ms. Doze would question whether the applicant was insane or incompetent;

(h) Ms. Doze indicated that she thought the applicant was guilty, but she then stated that she could still presume the applicant to be

innocent, leading the prosecutor to the conclusion that Ms. Doze did not understand the proceedings;

(i) Ms. Doze's responses throughout the voir dire caused the prosecutor to think that Ms. Doze did not understand the proceedings and issues and that she did not have the intellectual ability to make a decision in the instant case.

(R. I-64-71).

16. Prosecutor Henderson exercised a peremptory challenge against Ruthie Hines for the following race-neutral reasons:

(a) Mrs. Hines' job as a cashier in a liquor store caused the prosecutor some concern because of the type of business;

(b) Mrs. Hines' husband was unemployed at the time of voir dire and had been unemployed for eight or nine months; Mrs. Hines, who had two jobs, was the sole support of her family consisting of her husband and two children, prompting the prosecutor to doubt Mrs. Hines' ability to concentrate on the evidence if she were worried about her family's financial needs;

(c) Mrs. Hines indicated that she favored a life sentence rather than a death penalty, although she later stated that a person ought to be given the death penalty, causing the prosecutor

to believe that Mrs. Hines' first response was more valid;

(d) Mrs. Hines felt that her assessing the death penalty was morally wrong, leading the prosecutor to think that Mrs. Hines would be unable to assess the death penalty;

(e) Mrs. Hines indicated that she believed that a defendant would tell the truth, causing the prosecutor to think that Mrs. Hines would believe the applicant if he testified and related things differently than he did in his confession, namely, that he was not guilty;

(f) as a result of the entire voir dire of Mrs. Hines, the prosecutor thought that Mrs. Hines did not really understand what was happening, that she would not be able to make an intelligent, informed decision concerning the case, and that she would not be able to assess the death penalty.

(R. I-79-83).

17. Prosecutor Mary Milloy exercised a peremptory challenge against Gloria Price for the following race-neutral reasons:

(a) Mrs. Price expressed reservations against the death penalty at the outset of voir dire and indicated that she would prefer to assess a life sentence, but she was never able to

articulate her reservations concerning the death penalty;

(b) Mrs. Price stated that she had never thought about the death penalty, causing the prosecutor concern about an individual who had not devoted any previous thought to the death penalty process;

(c) there was an apparent communication problem between the prosecutor and Mrs. Price, which resulted in Mrs. Price sometimes giving unresponsive answers, causing the prosecutor to think that Mrs. Price either did not understand or that she was simply saying what she thought the prosecutor wanted to hear;

(d) Mrs. Price's employment as a lab assistant or technician in a hospital prompted the prosecutor to think that she would tend to see her function as more life-sustaining or life-giving as opposed to sentencing a person to death;

(e) the age of Ms. Price's children caused the prosecutor concern, since the applicant was nineteen years old;

(f) the prosecutor did not think that Ms. Price understood some of the legal explanations which the prosecutor gave.

(R. I-99-105).

18. The court finds that the State did not systematically exclude black persons from the jury in the instant case.

19. The court also finds that the State's explanations for peremptorily striking Audrey Dorsey, Perlie Doze, Ruthie Hines, and Gloria Price were neutral, unambiguous and non-racial reasons relative to the applicant's case, as required by the holding of Batson, id. The court further finds that the State's explanations are credible, plausible and legitimate reasons for exercising those peremptory challenges.

CONCLUSIONS OF LAW

1. This court concludes that the defense made a prima facie showing of discrimination by the State in the jury selection process (R. I-27).

2. This court further concludes that the prosecutors in the instant case did not exercise peremptory challenges in a discriminatory manner to exclude venirepersons based upon racial considerations, nor did they, in any way, purposefully or deliberately deny jury participation to black persons because of race.

ORDER

THE CLERK IS ORDERED to prepare a transcript of all papers in Cause No. 383749-A and transmit same to the Court of Criminal Appeals as provided by the Texas Code of Criminal Procedure. The transcript shall include the following:

1. the entire appellate record in Cause No. 383749, including the Statement of Facts, transcript and appellate opinions;
2. the application for writ of habeas corpus;
3. the Respondent's answer;
4. the Order of the Court of Criminal Appeals delivered on September 17, 1987;
2. the transcript of the Batson hearing held February 26, 1988 and exhibits thereto;
3. the Applicant's Proposed Findings of Fact and Conclusions of Law;
4. the Respondent's Proposed Findings of Fact and Conclusions of Law and Order.

THE CLERK is further ORDERED to send a copy of the Respondent's Proposed Findings of Fact and Conclusions of Law and Order to the applicant's counsel: Robert A. Shults, 1800 West Loop South, Suite 950, Houston, Texas 77027.

APR 2 0 1989

PRESIDING JUDGE

NO. 89-5072

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1989

RICHARD JAMES WILKERSON,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

APPEARANCE OF COUNSEL

The Clerk will enter my appearance as counsel for the State of Texas which in this Court is Respondent. I certify that I am a member of the bar of the Supreme Court of the United States.

ROBERT S. WALT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEY FOR RESPONDENT

NO. 89-5072

IN THE

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PROOF OF SERVICE

I hereby certify that on the 28th day of July, 1989, one copy of Respondent's Brief in Opposition was mailed, postage prepaid, to Richard Wilkerson, TDC# 756, Ellis I Unit, Route 6, Huntsville, Texas 77343. All parties required to be served have been served. I am a member of the Bar of this Court.

ROBERT S. WALT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2080

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE ME this 28th day of July, 1989.

NOTARY PUBLIC, State of Texas

OPINION

SUPREME COURT OF THE UNITED STATES

RICHARD JAMES WILKERSON *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 89-5072. Decided October 16, 1989

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to determine whether a prosecutor's exercise of peremptory challenges based in part on racial considerations violates the Equal Protection Clause.

I

Richard Wilkerson, an Afro-American, was convicted of murder by an all-white jury and sentenced to death. During *voir dire*, the prosecution exercised four of its twelve peremptory challenges to remove all of the potential Afro-American jurors. After trial, while petitioner's case was pending on direct review, this Court held that the Equal Protection Clause "forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black." *Batson* v. *Kentucky*, 476 U. S. 79, 97 (1986). Petitioner subsequently raised a *Batson* claim in a petition for habeas corpus filed in state court.

The trial court concluded that Wilkerson had made a prima facie showing of purposeful discrimination by the prosecution in the jury selection process. At the *Batson* hearing, one of the prosecutors who conducted *voir dire* conceded that race

was a factor in his peremptory strike of an Afro-American juror:

> Q. When you say you felt a little uneasy about [the juror] generally, was it your considered opinion that the fact that she was black and that the defendant was black might have some factor or might be some factor in her decision making process?
>
> A. I was not completely satisfied that it would not, but that was my uneasiness.

Responding to questions concerning his peremptory strike of a different juror, the prosecutor indicated that he "thought perhaps [the juror] might make some identification I guess with the defendant to some extent." The questioning continued:

> Q. Based on [the defendant and the juror] being of the same race?
>
> A. Yeah, that is just a factor.

Finally, on redirect examination by the state, the same prosecutor stated that his perception that an Afro-American juror would extend sympathy to an Afro-American defendant was "[o]ne of the many considerations [for striking a particular juror] but nothing major about that."

The trial court nonetheless concluded that the prosecutors "did not exercise peremptory challenges in a discriminatory manner to exclude venirepersons based upon racial considerations, nor did they, in any way, purposefully or deliberately deny jury participation to black persons because of race." The court based this legal conclusion on several pages of factual findings that relate in detail the prosecution's race-neutral explanations for its peremptory challenges to the Afro-American venirepersons. Unaccountably, these findings do not mention, much less discuss, the prosecution's open admissions that race played a role in its decision to prevent the Afro-American members of the venire from serving on the petit jury. This omission in the state court's factual

findings provides ample justification for this Court to dispense with the traditional deference, now codified by statute, that such findings are accorded on federal review. See 28 U. S. C. § 2254(d)(8) (presumption of correctness overcome if a federal court concludes that a state court's "factual determination[s] [are] not fairly supported by the record"). Accordingly, this case is properly characterized as one involving mixed prosecutorial motive in that the decision to challenge the Afro-American jurors rested on both race-neutral considerations and race-conscious factors.

II

The state trial court's implicit legal conclusion—that the Constitution does not prohibit a prosecutor from striking a juror even when the decision is based in part on his "intuitive judgment [that the juror] would be partial to the defendant because of their shared race," *Batson* v. *Kentucky*, *supra*, at 97—cannot be squared with *Batson*'s unqualified requirement that the state offer "a *neutral* explanation" for its peremptory challenge, *id.*, at 98 (emphasis added). To be "neutral," the explanation must be based *wholly* on nonracial criteria.

The trial court seems to have transferred a legal standard formulated in other contexts to the *Batson* inquiry by requiring the defendant to show that the Afro-American venirepersons would not have been challenged "but for" the prosecution's impermissible assumptions about race. In some instances in which a defendant's actions were motivated by a mixture of permissible and impermissible factors, we have recognized as a defense to liability a showing that the challenged actions would have occurred even absent the improper consideration. See, *e. g.*, *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285–287 (1977) (decision to terminate employment). A "but for" test is inappropriate in the *Batson* inquiry, however, because of the special difficulties of

proof that a court applying that standard to a prosecutor's peremptory-challenge decisions necessarily would encounter.

The "but for" standard requires the factfinder to address a counterfactual: whether a prosecutor would have struck the challenged Afro-American jurors if his decisions had not been clouded by impermissible racial considerations. Put another way, the question is whether the prosecutor would have struck the Afro-American jurors had they been white. To answer this question, the factfinder must decide whether the prosecutor's intuitive, racially-neutral reservations about the challenged Afro-American jurors were in each case greater than his intuitive reservations about the white jurors whom he chose not to strike. The court must determine not only whether a prosecutor's denial of racial motivation is credible—the current *Batson* question—but also whether a prosecutor's explanation for his *lack* of objection to white jurors is credible so that it can undertake the difficult task of comparing prosecutorial judgments of challenged and unchallenged jurors.

But how is the factfinder to uncover the prosecutor's intuitive reservations regarding the unchallenged white jurors? The only avenue of inquiry is to ask the prosecutor himself. If he claims not to have entertained such reservations, the questioning must end, because external corroboration of the prosecutor's explanation of his inaction is necessarily unavailable. No record memorializes the prosecutor's contemporaneous justifications for failing to challenge a juror. Moreover, given the purely subjective nature of peremptory challenges, such a record could not be made. Thus, the prosecutor's claim that he harbored no reservations regarding a particular juror is insulated from meaningful review. In contrast, some external corroboration *is* available regarding the prosecutor's affirmative decisions to strike; the factfinder can examine a prosecutor's justifications in light of the characteristics of the jurors actually struck to determine

generally whether the justifications were merely pretexts for racially-motivated considerations.

In this respect, the *Batson* context differs decisively from the employment context, where the court can examine an employer's treatment of similarly-situated applicants to test an employer's assertion that an Afro-American candidate would not have been hired absent a discriminatory motive. When an employer hires a white candidate over an Afro-American candidate, a factfinder can assess the employer's faithfulness to its own nonracial criteria by examining whether the particular white candidate's qualifications, as defined by the criteria, were superior to those of the Afro-American candidate. In the *Batson* context, though, the criteria underlying a prosecutor's peremptory challenges are private; a factfinder therefore lacks an independent means of evaluating the prosecutor's decisionmaking.

Thus, the "but for" test transforms a difficult credibility assessment—whether the prosecutor acted for the reasons he claims to have acted—into an impossible one—whether a prosecutor's nonracial ground for striking an Afro-American juror, taken alone, would have outweighed the prosecutor's possible grounds for objecting to unchallenged white jurors. The only choice, an untenable one at best, would be to accept at face value a prosecutor's claim that he "would have struck the Afro-American jurors anyway." A judicial inquiry designed to safeguard a criminal defendant's basic constitutional rights should not rest on the unverifiable assertions of a prosecutor who, having admitted to racial bias, subsequently attempts to reconstruct what his thought process would have been had he not entertained such bias.

III

Batson's greatest flaw is its implicit assumption that courts are capable of detecting race-based challenges to Afro-American jurors. Assuming good faith on the part of all involved, *Batson*'s mandate requires the parties "to confront

and overcome their own racism on all levels," *Batson* v. *Kentucky*, *supra*, at 106 (MARSHALL, J., concurring), a most difficult challenge to meet. This flaw has rendered *Batson* ineffective against all but the most obvious examples of racial prejudice—the cases in which a proffered "neutral explanation" plainly betrays an underlying impermissible purpose. To excuse such prejudice when it does surface, on the ground that a prosecutor can also articulate nonracial factors for his challenges, would be absurd. *Batson* would thereby become irrelevant, and racial discrimination in jury selection, perhaps the greatest embarrassment in the administration of our criminal justice system, would go undeterred. If such "smoking guns" are ignored, we have little hope of combatting the more subtle forms of racial discrimination.

In sum, while I remain committed to my view that, until peremptory challenges are eliminated altogether, these challenges will inevitably be used to discriminate against racial minorities, *Batson* v. *Kentucky*, *supra*, at 103, 107–108 (MARSHALL, J., concurring), I would find that this Court's requirement that a prosecutor provide a "neutral" explanation for challenging an Afro-American juror means just what it says—that the explanation must not be tainted by *any* impermissible factors. Requiring anything less undermines an already underprotective means of safeguarding the integrity of the criminal jury selection process.